THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Case No. 2015-CP-04-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,
In Re: Greg Battersby, — Appellant, Plaintiff

v.

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A., Allstate Insurance Company, And Allstate Northbrook Indemnity Company, — Defendants,

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A., — Respondents.

INITIAL BRIEF OF APPELLANT

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s/Donald L. Smith
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Anderson, South Carolina
March 29, 2021.

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STATEMENT OF CASE AND FACTS

I. THE GENESIS OF THIS ACTION

Dr. Gregg Battersby (hereinafter referred as "Battersby") is a chiropractor providing chiropractic services in his house. On August 2, 2013, Battersby was arrested on separate charges of indecent exposure by two (2) of his clients, Ms. Jan Morton-Gantner (hereinafter referred as "Morton") and Carrie Neal (hereinafter referred as "Neal"). These claims spawned several legal cases involving Battersby.

The alleged offense: INDECENT EXPOSURE

Dr. Battersby and Neal:

Through a friend's referral, Neal sought Battersby's services after suffering injuries due to a vehicular accident. (Deposition Transcript-Jan Morton-Gantner, June 3, 2014, p. 49, l. 16-25). Neal began her sessions with Battersby sometime in September 2012 (Depo. Trans., Neal, p. 57). This lasted until May of 2013.

Battersby was supposed to help adjust Neal's back and hips. After eighty-seven (87) visits, Battersby released Neal from his care. Upon learning that her bill amounted to $12,100.00, Thomas Dunaway, Esquire (Neal's attorney for the MVA) had Neal seek out an itemized bill. This request was made despite the fact Dunaway had included an itemized bill in the demand he made to Allstate which offered $15,000.00 to settle the claim. (Neal Depo Trans, p. 12, 15.25 & p. 13, 1).

In order to get said bill, Neal allegedly visited Battersby at his house/clinic on May 23, 2013. She claimed that she was ushered in by a half-naked Battersby, who soon after presented himself fully naked as he gave her the itemized list. (Depo. Trans, Neal, p. 13, l. 14-25). Prior to learning the cost of her eighty-seven (87) visit course of treatment, Neal admitted having no trouble with Battersby's services, nor having had any incident of indecent exposure. (Depo. Trans. Neal, p. 51, l. 8-16). Neal alleged she met with Battersby after the May 23, 2013 incident. She went to his house to get a claim form she believed will help her with her auto accident claims. (Neal Depo. Trans., p. 36, 16.25 & p. 37, 1.21). Neal admitted having talked with Morton. (Neal Depo. Trans., p. 30-31).

On July 25, 2013, Neal reported to the ACSO of an incident involving an indecent exposure by Battersby.

Dr. Battersby and Morton:

Neal apparently satisfied with Battersby's services referred him to her friend, Morton.

Morton and Neal were friends who became Battersby' clients. Upon being referred by Neal, Morton began her chiropractic care with Battersby on May 2, 2013. Battersby gave her a plan of care which involved multiple visits/sessions, which she was unable to follow as prescribed. On June 1, 2013, she went to Battersby's residence for her therapy. It was an unscheduled one as she just returned from a vacation. She called Battersby to ask for an appointment, the latter accommodated her on that day. Morton later told the officer she gave her initial complaint to that upon arriving at Battersby's, he answered the door in a men's robe and directed her to his treatment room. Battersby allegedly disappeared for a few minutes but returned, still in his robe. He got Morton onto the exam table and conducted treatment on her neck area. Morton stated he then used a mechanical massager to work on her back area.

She stated that after the massager, Battersby made her move to another table and lie face down, while he massaged her lower extremities. She offered this was not a normal practice in previous sessions. Morton stated that Battersby was moving towards her bottom area, making her feel uncomfortable. She stated specifically there was no contact of a sexual nature. As she got up to leave, she saw Battersby's robe fall to the floor exposing a fully erect penis. She stated that she left the house without further incident.

Morton claimed Battersby had been calling her for therapy while she was on vacation. She admitted she told her husband of the incident, who convinced her to report the same to the ACSO. On July 8, 2013, after four (4) sessions with Battersby, Morton filed a report of indecent exposure against him. An Incident report based on Morton's claim (see the previous paragraph) was created, and ten (10) days after, Morton was interviewed by Detective Ashley. In the recorded interview, Morton disclosed Battersby was wearing a towel and rubbed his "stuff" on her back. Morton broached the topic of incidents which were alleged to have occurred in foreign state jurisdictions. These statements were in direct contradiction to the accounts found in the Incident Report.

Two separate warrants were issued against Battersby, who was arrested on August 2. 2013. He was indicted on both charges on November 19, 2013. As a result of the conflicting stories of the alleged victims, the Tenth Circuit Solicitor's Office subsequently dropped the criminal cases against Battersby on April 24, 2014. Battersby, thereafter filed separate suits against the individual deputies and ACSO for violation of his civil rights (Battersby v. Ashley, et al, Case No. 8:15-cv-00066-BHH-JDA; Battersby v. John Skipper, Appellate Case No. 2016-000973, Unpublished Opinion No. 2018-UP-377).

THE LLR CASE: THE ADMINISTRATIVE CASE

After going to the police to make an incident report, Morton met with her attorney for the pursuit of her personal injury claim J. Kirkman Moorehead, Esquire. Mr. Moorehead helped Morton file a complaint against Battersby in the South Carolina Department of Labor, Licensing and Regulation ("LLR"). This being an administrative case, complainants are usually required to accomplish a form as basis for the initial Complaint. In commencing her complaint, according to Morton, Respondent Moorhead completed the online complaint. Respondent Moorhead stipulated Morton treated twenty (20) times over the course of four (4) months, despite knowing (at least implicitly) she had only been to see Battersby four (4) times. Investigators from the LLR called Morton regarding her complaint.

On August 20, 2013, Battersby's license was suspended by the State Board of Chiropractic Examiners ("Board") after investigation by the Office of Investigations and Enforcement ("OIE") of the South Carolina Department of Labor, Licensing and Regulation ("SCDLLR"). Battersby filed an action in the Federal Court against the members of the State Board of Chiropractic Examiners for suspending his license to practice (Battersby v. Carew, C.A. No. 8:14-761-HMH); and against his former clients (Battersby v. Neal and Morton, C.A. No.: 2014-CP-1121).

In furtherance of Battersby's claims, it was necessary to depose his accusers, Morton and Neal. As she was being served with a subpoena for her deposition, Neal offered an interesting statement to Mr. Michael Moske, the private investigator serving the subpoena. Neal told Moske, "I'm not the only one. There are other guys." Taking this as an implied admission of a conspiracy, Appellant took the depositions of Neal and Morton with the intent of finding out the other parties to the conspiracy.

Discovery completed in the against the LLR provided the opportunity to see how specious Morton's and Neal's claims were. Based on the findings of said discovery, it became readily apparent the claims were fabricated. Appellant made a specific request with the sheriff's office upon learning of an audio tape recording of an interview by an officer with Morton. This audio tape recording was not originally provided to Battersby, until after Appellant filed a Motion to Compel the Sheriff's office for the same.

The recording illustrated various discrepancies with Morton's statements offered in the Incident and Supplementary Reports, which had been completed ten (10) days prior to the recorded interview. Appellant believes these inconsistencies led the Solicitor to dismiss the criminal cases against Battersby. However, the temporary suspension continued depriving Battersby of his opportunity to earn a living.

BATTERSBY V. NEAL: THE CONSPIRACY

Battersby believed Neal, Morton and their counsels had information regarding a prior Ohio case involving Battersby. The Ohio case, involving similar facts found herein, went to the jury and resulted in an award for Plaintiff in the amount of $2,450,000.00 against Battersby and his Mentor Chiropractic Center.

> MON. 2/05/96 VERDICT--FOR PLAINTIFF AGAINST MENTOR CHIROPRACTIC CTR & GREGG N. BATTERSBY COMPENSATORY DMG $125,000 AG MENTOR CHIROPRACTIC CT. COMPENSATORY DMG $125,000 AG GREGG N. BATTERSBY PUNITIVE DMG $250,000 AG MENTOR CHIROPRACTIC CT. PUNITIVE DMG $1,250,000 AG GREGG N. BATTERSBY AR VOLUME # 1045 PAGE # 876
>
> MON. 6/17/96 PLAINTIFF GRANTED ATTORNEY FEES CONSISTENT WITH THE CONTINGENCY FEE ARRANGEMENT ENTERED INTO BETWEEN PLAINTIFF AND HER COUNSEL. PLAINTIFF SHALL RECOVER TOTAL ATTORNEY FEES OF SEVEN HUNDRED THOUSAND DOLLARS ($700, 000) WITH INTEREST AT THE RATE OF TEN PERCENT (10%) AS PROVI DED BY LAW ACCRUING FROM FEBRUARY 20, 1996, THE DATE OF THIS COURT'S ORIGINAL JUDGMENT ENTRY.

> DEFENDANTS' MOTION FOR SUP ERSEDEAS BOND IS GRANTED IN THE AMOUNT OF $2,450,000 WHICH B OND SHALL BE POSTED NOT LATER THAN THREE DAYS FROM THE DATE OF THIS ENTRY. IT IS SO ORDERED. VOLUME # 1062 PAGE # 1047

(94CV000120 MCCORD, KELLY vs. MENTOR CHIROPRACTIC CENTER INC et al.)

Whether Neal, Morton and their lawyers were inspired by this case may be gleaned from what occurred in this case.

On May 30, 2014, Battersby filed a case against Neal and Morton alleging the following causes of action: (1) false arrest and or deprivation of liberty; (2) defamation; (3) false arrest at instigation of defendants; (4) malicious prosecution; and, (5) civil conspiracy.

By virtue of Order, dated September 4, 2014, Battersby amended his complaint to include Dunaway and add the cause of action for breach of contract, on September 26, 2014. The inclusion of Dunaway was based on the medical lien agreement entered into between Battersby and Dunaway which allowed Battersby to treat Neal for injuries related to the car accident. In turn, Battersby's services would be satisfied upon the settlement of the vehicular accident litigation. The car accident case was settled, and the settlement proceeds were placed in trust and subsequently distributed to all providers, except Battersby. After meeting Neal to sign the release and endorse the carrier check, neither she nor Dunaway made contact with Battersby. Battersby's inquiry into the status of his proceeds was followed being charged for indecent exposure. Neal, Morton and Dunaway, each filed an answer and/or motion to dismiss the case against them.

On November 6, 2014, Battersby attempted to add Respondents and Allstate Insurance as Third-Party Defendants in the case. Battersby failed to appear for the hearing of such motion, which was dismissed. A second motion to allow them to enter the fray was denied on March 4, 2015, thus the filing of a separate action against Respondents and Allstate Insurance.

On June 29, 2015, Battersby informed the Circuit Court of the removal of Appellant as counsel for the case. Battersby proceeded with this case pro se.

BATTERSBY V. MOORHEAD, ET. AL.: THE SANCTIONS

Alleging Respondent Attorneys conspired with Morton and Neal to (1) state claims of indecent exposure to secure potential compensation (2) bring charges against Battersby with the ACSO; and (3) file a case against him with the LLR, Battersby brought a complaint against Respondents on March 20, 2015, asserting the following causes of action, to wit: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED); (4) malicious prosecution; (5) conspiracy; (6) fraud; and, (7) abuse of process. Battersby alleged Neal and Morton conspired with Respondent Attorneys to file multiple cases against him based on misleading and inconsistent statements, with the end goal of sharing any monetary judgment obtained.

Battersby filed a Complaint against Allstate Insurance (hereinafter referred as "Allstate") based on good faith belief the company knew of the medial lien agreement entered between its client, Neal, Dunaway and Battersby. Battersby maintains Neal, Dunaway and Allstate conspired to deny payment to him. To date, Neal has not paid her outstanding balance to Battersby. Three causes of action were alleged against Insurance: (1) conspiracy; (2) negligence, and (3) gross negligence.

Both Respondents and Allstate moved to dismiss the complaint against them. Battersby opposed each motion.

On June 12, 2015, the Circuit Court dismissed the case against Allstate, finding improper joinder of parties, improper pleading the elements of conspiracy and failure to demonstrate all the elements of negligence. On June 25, 2015, Allstate sought sanctions under Rule 11 SCRCP

and the Frivolous Claims Proceedings Sanctions Act (hereinafter referred as "FCPSA") against Battersby. Allstate's motion for sanctions was denied in the Circuit Court's Order, dated August 13, 2015.

On June 30, 2015, Appellant moved to withdraw all pleadings, motions and other documents filed by Battersby in this case. On July 1, 2015, he also moved to be relieved as counsel in the instant case. His Motion to Withdraw was granted on July 10, 2015, while his request to be relieved as counsel was granted only on October 8, 2015. It should be noted that as early as June 29, 2015, Appellant was no longer representing Battersby in the accompanying case, i.e. *Battersby v. Neal, et al.*

On July 10, 2015, the Circuit Court granted Respondents' motion for summary judgment and motion to dismiss. On July 24, 2015, Respondents moved for sanctions to be imposed against Appellant under Rule 11 SCRCP and FCPSA. Appellant opposed the same.

On February 4, 2016, the Circuit Court issued an Order, granting the sanctions against Appellant under Rule 11 SCRCP. Appellant moved to reconsider the Circuit Court's findings, which was denied in a Form 4, dated April 22, 2016. Since a Formal Order was not entered, Appellant did not act on the Form 4.

Three years later, Respondents filed a Motion to Enter the Monetary Sanctions in the Judgment Rolls, which the court granted on December 16, 2019. This appeal followed.

STANDARD OF REVIEW

The determination of whether a court should impose sanctions pursuant to Rule 11, SCRCP, or the Act is a matter of equity. Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). "In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its

own view of the preponderance of the evidence." *Id*. However, when the appellate court agrees with the circuit court's findings of fact, it reviews the circuit court's imposition of sanctions under an abuse of discretion standard. *Id*.; *see also* Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). "Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions." *Se. Site Prep*, 394 S.C. at 104, 713 S.E.2d at 654, as cited in Harwell v. Harwell, Appellate No. 2017-002290 (S.C. Ct. App. Nov. 18, 2020).

ARGUMENTS

I.

THE CIRCUIT COURT ABUSED ITS DISCRETION IN IMPOSING THE SANCTIONS AGAINST APPELLANT.

A. THE MOTION WAS PROCEDURALLY DEFECTIVE.

Respondents' request for sanctions under Rule 11 should have been denied on procedural grounds. The Complaint was dismissed prior to Respondent's filing of her motion for sanctions. Furthermore, Respondents did not comply with the requirements laid down in Rule 11 of the SCRCP.

1. Respondents' Motion for Sanctions did not comply with Rule 11 SCRCP.

Rule 11 (a) SCRCP requires Respondents to undertake good faith efforts to confer or attempt to confer with Appellant to resolve the matter, prior to filing their Motion. Rule 11 provides:

> **(a) Signature.** Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need

> not be verified or accompanied by affidavit. The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; **that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.** An attorney or party may only utilize an electronic signature in pleadings, motions or other papers that are E-Filed in the SCE-File electronic filing system.
>
> **All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose or could not be timely held.** There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.
>
> **If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken** unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. (Emphasis supplied).

Rule 11, SCRCP.

A pre-requisite in the filing of a motion for sanctions is for the moving party (in this case the Respondents) to consult with opposing counsel before filing a motion. Rule 11, SCRCP. The same rule also mandates moving party must certify to the Court that such consultation either has occurred or was useless. Respondents did not consult with Appellant before filing the Motion for Sanctions.

The Rules of Civil Procedure are unequivocal about the repercussions for a movant's failure to consult: the motion must be stricken, and the Court may order the moving party to pay the other party its attorney's fees or any other appropriate relief. Rule 11, par. 3. The Court, instead of striking Respondents' Motion, rewarded them with sanctions amounting to $11,206.20. Appellant believes equity and due process require the Rule to be applied as written, not in accordance with how a party may be affected by it.

2. Appellant's Complaint and other pleadings had been withdrawn prior to Respondent filing his motion for sanctions.

On June 30, 2015, Appellant on behalf of Battersby, filed a motion to withdraw all the pleadings, motions and other documents associated with the present case. The Court granted Battersby's motion on July 8, 2015. On the same date, the Court also granted summary judgment in favor of Respondent Moorhead. Plaintiff submits this withdrawal serves as a voluntary dismissal of the action against Respondent Moorhead.

On July 24, 2015, Respondent Moorhead filed a Motion for Sanctions under Rule 11 SCRCP and the Frivolous Claims Sanctions Proceedings Act on, which the Court granted on February 3, 2016.

Appellant submits the Court committed reversible error in granting Respondent Moorhead's Rule 11 sanctions request when the case has technically been voluntarily dismissed. It is well-settled that "… a voluntary dismissal or non-suit brings about the same situation or result as if no suit had been." Allen v. Atlanta C.A.L. Ry. Co., S.C. 57 S.E.2d 249, 250. And, if there is no suit, then it is as if no Complaint or pleading has ever been signed by Appellant.

Appellant had withdrawn the Complaint before Respondents had moved to sanction him. It may be argued at the time the motion and the order for sanctions were made, there was no more 'offensive' or 'frivolous' pleading in existence. Furthermore, Respondents failed to either

file a Motion to Reconsider the dismissal pursuant to pursuant to Rule 52(b), Rule 59 (e) or Rule 60(b). They also failed to appeal the dismissal and the plain meaning found therein.

In this case, the Circuit Court granted Respondent Moorhead's motion to dismiss on July 10, 2015. Respondent Moorhead filed its motion for sanctions under the FCPSA on July 24, 2015. More than ten days had lapsed since the Circuit Court dismissed the Complaint and the filing of the request for sanctions. Thus, the motion was not timely filed under the FCPSA.

B. THE COURT APPLIED INCORRECT STANDARD IN IMPOSING SANCTIONS AGAINST APPELLANT.

A careful scrutiny of the Order dated July 23, 2015 would show the Circuit Court granted the motion under Rule 11 SCRCP, while being silent on the FCPSA. However, it is undisputed the Circuit Court Judge made a directive that the sanctions shall be granted based only on Rule 11. This is significant because while the ruling was based on Rule 11 SCRCP, the Court applied the FCPSA's "reasonable attorney" standard.

Under Rule 11 SCRCP, a sanction may be imposed under two conditions: (1) if pleading is frivolous; or (2) if the filing was in bad faith or for improper purpose, whether there is ground to support it. Neither condition appears in this case.

1. The Complaint is not frivolous.

"An attorney takes a frivolous position if he fails to make a reasonable inquiry into the facts (which later proves false) or takes a position unwarranted by existing law or a good faith argument for its modification." Magnus Elecs., Inc. v. Masco Corp., 871 F.2d 629 (7th Cir. 1989).

Appellant submits the allegations and factual contentions in this case have evidentiary support. Jurisprudence provides sanctions may not be imposed unless a particular allegation is

utterly lacking support. Storey v. Cello Holdings, L.L. C., 347 F.3d 370, 391 (2d Cir. 2003) quoting O'Brien v. Alexander, 101 F.3d 1479, 1589 (2d Cir. 1996).

Prior to filing this suit, Appellant and Battersby conducted investigation of the facts the latter would be required to prove to substantiate his claim. A more in-depth discussion of the substantive merits of the Complaint follows in the next section.

2. The initiation of this lawsuit was intended to right a wrong and did not cause any injury nor harassment to another party.

The Fourth Circuit Court has elaborated that "if a complaint is not filed to vindicate rights in court, its purpose must be improper. In Re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990). *Kunsler* case offered a way to determine whether a party has filed a motion or a pleading for an improper purpose. The Court declared at *Kunsler*, "In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the "signer in pursuing the suit." *Id.*

Appellant states Battersby was not motivated solely by the financial gain in pursuing his claims against the Respondents, but in righting a wrong. Appellant filed the instant case based on the statement offered by Neal to Mr. Moske and subsequent discovery that implied a plan was hatched to seek damages from Battersby for accusations which had already been dismissed by the Solicitor.

Appellant illustrated Respondent Moorhead's participated in the plan by fostering and facilitating a complaint with the LLR that included false information to bolster the credibility of his client, Morton. Morton had simply been a "corroborating" witness of Battersby's misdeeds. She had no ongoing physical issue; and her home was thirty (30) minutes from the chiropractor. Morton admitted that she had seen Battersby four times while Respondent Moorhead, who

completed the Complaint on her behalf, expressed to the LLR she had seen Battersby twenty (20) times. Morton was adamant she never expressed she had been to Battersby more than four times. Moreover, Moorehead never disassociated himself from Morton's statement he had prepared the faulty complaint to the LLR. Despite the knowledge that the information he provided the LLR was incorrect, Respondent Moorhead made no attempt to remove the faulty information thereby allowing Battersby to be further persecuted with the same.

C. THE CLAIMS HAVE BASIS IN LAW AND FACT.

The Complaint and the legal contentions supporting the same have meritorious bases.

1. <u>There was a good ground to support the Complaint.</u>

A cursory reading of the text of the Rule shows the pleader need not be correct in his view of the law. It only requires the pleader must have a good faith argument for his view of what the law is or should be. This can be achieved through a reasonable inquiry.

Prior to filing this suit, Appellant and his counsel reviewed the evidence and whether he would be able to substantiate his claim. Appellant was able to procure and has in fact submitted the following material evidence: Affidavit of Moske, Medical Lien Agreement between Dunaway and Battersby, audiotaped interview of Morton with Officer Ashley, Incident Report, etc.

It has long been established a suit is frivolous if it lacks "an arguable basis in law or fact." <u>Neitzke v. Williams, 490 U.S. 319, 325</u> (1989). In this case, Battersby's Complaint against Respondents had basis in law and in fact. This case was grounded on Dunaway's failure to address his client's outstanding lien to Battersby. Neal and Dunaway attempted to justify the non-payment of the balance by way of the charges brought against Battersby. The case was initiated by Neal and Morton who both alleged Battersby exposed himself to them on one

occasion. Neal and Morton were friends who were in constant communication with each other. These charges were filed after Dunaway encountered difficulty resolving Neal's wreck case with Battersby's $12,100.00 chiropractic bill for services.

Appellant and Battersby believed in good faith Dunaway, Neal and Morton conspired to deprive Battersby of his lawful professional fees by instituting baseless complaints against him. Due to these incredible claims by Neal and Morton, Battersby's professional license was suspended, and he was deprived of his means of livelihood for two (2) years.

The case against Respondent Moorhead was based on good faith belief he facilitated the conspiracy by filing a Complaint riddled with inconsistent and false statements with the LLR. It was also Defendant's understanding and belief Respondents' provided the information regarding Battersby's judgment in Ohio to Neal and Morton, which fueled the conspiracy.

Appellant sufficiently established the elements of the cause of action for conspiracy.

Appellant submits Battersby's Complaint has sufficiently established the elements of civil conspiracy as follows: (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Pye v. Estate of Fox ex rel. Estate of Fox, 369 S.C. 555 (S.C. 2006).

In alleging civil conspiracy against Battersby, Battersby raised the following claims in in his Complaint:

(1) Moorhead was part of a conspiracy claiming Battersby exposed himself to Morton on June 1, 2013. (Complaint, p. 2).
(2) Moorhead encouraged Morton to file criminal charges against Battersby with the ACSO (Complaint, p. 2).
(3) Moorhead encouraged Morton to embolden Neal, to file a similar criminal complaint with the ACSO (Complaint, p. 2).
(4) Moorhead filed a Complaint with SC Department of Labor Licensing Regulations against Battersby on behalf of Morton (Complaint, p. 3).
(5) Battersby was arrested by the ACSO based on false statements made by Morton and her then counsel of record, Respondents. (Complaint, p. 2).

(6) Respondents knew that the statements were false (at least implicitly) and intended for the ACSO to act on these. (Complaint, p. 3).
(7) Battersby's liberty was restricted by his arrest and his license to practice chiropractic suspended based on false charges, which were dismissed without the opportunity to speak to a jury of his peers. (Complaint, p. 4).

Under Rule 11. A "complaint containing allegations unsupported by any information obtained prior to the filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to Rule 11 sanctions." Baker v. Bootz Allen Hamilton, Inc. 358 Fed. Appx. 476, 483-484 (4th Cir. 2009).

These allegations were supported by Morton's admission on the following:

(1) Morton admitted having knowledge of the sexual harassment case against Battersby, which took place in Ohio.
(2) Neal's admission she knew of the Ohio case.
(3) Morton admitted having read court documents pertaining to the Ohio case at her counsel's office.
(4) Morton admitted Respondent Moorhead completed her LLR Complaint.
(5) Morton admitted the LLR Complaint contains false statement/information.
(6) Morton admitted her counsel suggested for her to talk and ask Neal to file a report against Battersby.
(7) Neal denied having experienced any misconduct or indecent acts from Battersby in her 87 visits and/or treatment with him.
(8) Neal's complaint came after she received her billing and after consulting with Dunaway.
(9) Dunaway signed a medical lien on November 21, 2021 and he admitted he instructed Neal not to honor the lien because of the alleged misconduct. (Tom Dunaway's Answer and Counterclaim).
(10) Neal's admission of returning to Battersby's house after the alleged misconduct defies logic.

On Morton's knowledge of the Ohio case vs. Battersby:

Despite her repeated denials, it was shown during her deposition that Morton had not been forthright on her knowledge of Battersby. Morton admitted having seen and/or read Battersby's Ohio case at Respondents' office.

03. MS. MORTON: I read in the court document that he
04. had, I don't know if it was Arizona or Ohio,
05. and I don't know if it was the judge, I was

06. just skimming over it, but said that he had
07. shown signs or something of anger and agitation
08. as -- I don't know what case it was, but as it
09. continued.
10. MR. ASHLEY: I didn't see it. I'll have to read over
11. it again. I just got it last week.

(Depo. Trans., Morton, p. 56, 3.11).

This strengthened Battersby and Appellant's beliefs Morton, Neal, Dunaway and Moorhead knew of Battersby's case in Ohio. They made use of this information to somehow evade payment of Neal's staggering unpaid balance (amounting to $12,000) by conspiring to bring a baseless case against Battersby.

On Respondent Moorhead providing false or incorrect information in the LLR Complaint:

The intent to cause injury on Battersby was evident in Morton and her counsel. Respondent's act of submitting multiple contradictory statements in different agencies. (Complaint, p. p. 3). To substantiate this, Battersby submitted Morton's deposition statement admitting Respondent Moorhead provided false information in the DLLR Form.
In this regard, Battersby's Complaint may not be considered frivolous, as it was based on facts and document and testimonial evidence. The claims presented by Battersby had underlying justification, and while the theories proposed may be challenging, they are not improbable. Appellant is aware of the difficulty in proving conspiracy as direct proof of agreement is very rare to obtain. United States v. Koenig, 856 F.2d 843, 854 (7th Cir. 1988). However, just because a case is difficult to prove does not mean there is no ground to support it. That Appellant had difficulty providing direct proof to substantiate his civil conspiracy claims against Respondents did not mean the claims were frivolous.

2. The legal contentions supporting the Complaint were warranted by law.

In their Motion to Dismiss Battersby's Complaint, Respondents raised as defense the doctrine of attorney immunity laid down in in *Pye v. Estate of Fox,* that an attorney is generally immune from liability to third person arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Pye v. Estate of Fox, 369 S.C. 55, 564 S.E.2d 505, 509 (2006). (Respondents' Motion to Dismiss, p.2). This doctrine is rotted in the pronouncement by the Court of Appeals in *Gaar v. Mrytle Beach*, that an attorney normally litigates solely in his professional capacity and he has no personal interest in the suit. Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525 (S.C. Ct. App. 1986).

Appellant submits this Court failed to appreciate the aforesaid doctrine of attorney immunity provides for an exception. (Opposition to Motion to Dismiss, pp.2-4). The cases of Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) and Douglas ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (S.C., 2001) discussed an exception to this attorney immunity doctrine. Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 697 S.E.2d 551 (S.C., 2010). In both *Stiles* and *Douglas,* the Court ruled an "attorney may be held liable where, in addition to representing his client, he **breaches some independent duty to a third person** or **acts in his own personal interest, outside the scope of his representation of the client.**"

While the Court did not apply the exception in *Douglas* and *Stiles*, these cases paved way in proving the attorney immunity doctrine is not absolute. Given the above ruling, a lawyer may be sued if he: (1) commits a breach of independent duty to third person; (2) acts in his own personal interest, outside the scope of his representation of his client.

The Fourth Circuit Court had an occasion to restate the *Gaar v. Mrytle Beach Realty Co. Inc., 287 S.C. 525, 529, 339 S.E.2d 888* doctrine in its decision in Fleming v. Asbil, 42 F.3d 886,

890 (4th Cir. 1994) where it ruled "So long as an attorney acts in his client's interests, and not for personal or malicious reasons, he is immune from suit to an opposing party." Ibid. Appellant infers from this a lawyer may be susceptible to suit if he acts with malicious intent or for personal reasons.

South Carolina courts have discussed exceptions to the Attorney Immunity doctrine in several cases such as Moore v. Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (where court held debtor's attorney owed a duty of care to creditor), Gordon v. Busbee, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2011), (where court held attorney liable to third person for aiding and abetting the breach of fiduciary duty, by another person or his client.

Even out of state courts recognized the exception to attorney immunity: Wisconsin Courts in Goerke v. Vojvodich, 67 Wis.2d 102, 105, 226 N.W.2d 211 (1975) and Auric v. Continental Casualty Co., 111 Wis.2d 507, 331 N.W.2d 325 (1983) ruled immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled.

Applying this exception to the instant case, Battersby asserted that under Rule 3.3 of the South Carolina Rules of Professional Conduct, Respondents had a duty to disclose the false statements proffered by Morton to the ACSO. (Opposition to Respondents' Motion to Dismiss, p. 3). Appellant further avers Respondent violated Rule 3.4 of the said Rules. Both Appellant and Battersby asserted Respondents committed acts outside the scope of their representation of their Client.

Respondents violated a duty to third person.

Rule 3.3 (a) proscribes a lawyer from knowingly making a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. (Rule 3.3(a) of the Rules of Professional Conduct). Appellant and his client assert Respondent Moorhead, who did not represent Morton in the LLR case, violated the same when in preparing and assisting Morton with the LLR Complaint (and/or Form), he knowingly provided false information. That Moorhead himself accomplished the LLR Complaint was admitted by Morton in her deposition:

Q. Is there a reason you used Jan Gantner on this one, not Jan Morton?
A. Yes.
Q. Why is that?
A. My attorney had typed that information in.
Q. Did you see Mr. Moorhead before July 8th or after July 8th?
A. Oh, I don't know. I don't recall.
Q. Who told you to call the LLR?

(Depo. Trans., Morton, p. 27, 16.24).

BY MR. SMITH:
Q. Who filled out the online complaint to the LLR?
A. I did that with my attorney.
Q. How many times did you see Dr. Battersby?
A. I don't recall.
Q. When was the first day you saw him?
MR. MATTHEWS: Object to the form.
THE DEPONENT: I think it was May 2nd, I believe. I'm not sure.
EXAMINATION RESUMED
BY MR. SMITH:
Q. In this complaint it says that you've been treating with Dr. Battersby once a week for about 20 weeks.
A. Where is it?
Q. It's in the LLR complaint, first paragraph, third sentence, I think.
MR. MATTHEWS: Are you talking about Exhibit 3?
MR. SMITH: Yes, sir.
THE DEPONENT: No, it wasn't 20 weeks. I didn't see

5 him until May 2nd, I believe.

(Depo. Trans., Morton, p. 47, 10.18)

17. Q. But you didn't see him for 20 weeks?
18. A. No, I did not see him for 20 weeks.

(Depo. Trans., Morton, p. 48, 17.18

06. Q: "Dr. Battersby had been treating me for cervical issues
07. once a week for 20
08. weeks."
09. Is that true?
10. A: "No. The 20 weeks is wrong."
11. Q: "And can you estimate—I believe you said
12. earlier that you thought you may have started
13. with Dr. Battersby back in April."
14. A: I thought I did, but I went back and looked.
15. It was May 2nd."
16. Q: What did you look at?
17. A: The cancelled check from my first visit.

(Depo. Trans, Morton, June 18, 2014, p. 76, 11. 6-17).

In all the above-cited statement, Morton stated confidently she had not seen Battersby twenty (20) times and, therefore, the statement contained in the DLLR Complaint and/or Form was false. It was also established Respondent Moorhead prepared the required (online) document. (Depo. Trans., p. 27, 16.20). The only logical conclusion to be gathered based on Morton's statements is either Morton lied about the number of times she had seen Battersby, or that Respondent Moorhead knowingly misrepresented the frequency of the visits. Either way, Respondent Moorhead still violated the above-cited Rule for failing to amend the LLR Complaint and/or Form.

Respondents violated a duty to opposing party and counsel.

Appellant declares Respondents were also guilty of violating Rule 3.4 of the Rules of Professional Conduct, which prohibits a lawyer from falsifying evidence, counseling or assist a

witness to testify falsely, or offer an inducement to a witness that is prohibited by law. (Rule 3.4(b)South Carolina Rules of Professional Conduct).

Battersby presented evidence of inconsistent statements offered by Morton on different occasion:

a) in the police report, she said Battersby was wearing a robe when he invited her in his house (Exhibit -Police Report), while in her interview at her house some ten (10) days later, she changed her story and stated Battersby was wearing a towel (Depo. Trans., Morton, p. 57, 10.22).

(b) in the police report, Morton stated there was no sexual contact (Police Report), while she claimed Battersby placed his Johnson on her back (Depo. Trans. 25-26).

Morton's propensity to fabricate was in full show during the Deposition when she was asked regarding her knowledge about Battersby's practice. In the interview with Officer Ashley, which was played during Morton's deposition and later transcribed in it, Morton volunteers the following information to Officer Ashley:

08. MS. MORTON: And I think that he -- he specializes in
09. pediatrics, so that's really what –

(Depo. Trans., Morton, p. 67, 8.9).

It should be noted the interview with Officer Ashley took place before Morton's deposition. Thus, it can be deduced Morton have known of Battersby's practice at the pediatrics long before the deposition took place, where she testified to the following:

23. Can you remember who told you about the
24. pediatric aspect of his practice?
25. A. I don't know. It had to have been somebody at
01. the police department.

(Depo. Trans., Morton, pp. 38-39).

Contrary to the Circuit Court's ruling, Appellant does not find these inconsistencies as "subtle differences of no material distinction". (Order Granting Respondents' Motion for

Summary Judgment and Motion to Dismiss, July 23, 2015). Appellant believes the discrepancies are far too prevalent, and underscore Morton's deceitful character. Respondents' convenient ignorance and their fostering and facilitation of baseless, heinous charges against Battersby by their client is actionable.

Respondents Acted outside the scope of their representation of their client.

Battersby maintains Respondents' acts of condoning and/or promoting perjury as well as deliberately providing misleading and/or false information in the LLR Complaint were acts considered outside the scope of their representation of their client. Rule 4.1. Truthfulness in Statements to Others, South Carolina Rules of Professional Conduct provides that a lawyer shall not knowingly make (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Appellant maintains he has submitted substantial circumstantial evidence, sufficient for the Circuit Court to submit the case to trial.

> Circumstantial evidence, however, gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury. *See Frazier*, 386 S.C. at 532, 533, 689 S.E.2d at 613, 614 (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *Cherry*, 361 S.C. at 595, 606 S.E.2d at 478.

State v. Rogers, 748 S.E.2d 265 (S.C. Ct. App. 2013).

By knowingly submitting a Complaint with false statement and/or faulty information with the LLR, Respondents bolstered the violation of ethical standards imposed upon lawyers.

In assessing sanctions, the Circuit Court found the following reasons for imposition of $11,206.20: (1) Appellant filed the claims without researching the law on attorney immunity to

determine whether the claims were viable and supported by law; (2) cause of action for conspiracy was based upon mere suspicion without supporting evidence; (3) there is simply no cognizable basis in law or fact to conclude these acts falls outside the scope of attorney's representation; (4) no evidence to support bald assertions created, made up or embellished facts to strengthened their client's case (Order, p. 5); and, (5) Rule 3.3 does not impose a duty on Respondents, and even if duty was owed, that Respondents breached no such duty. (Order).

Appellant briefly addresses each ground as follows:

(1) It is clear from the above-discussion Appellant argued this case was an exception from the doctrine of attorney immunity since the Complaint alleged Respondent Moorhead acted outside the scope of his representation when he knowingly provided false and misleading information in the LLR case, and in instructing Morton to convince Neal to report a baseless claim. Appellant discussed how Respondents were responsible for violating their duty to the court, opposing party and his client.

(2) Appellant's conspiracy allegations were not mere suspicion. He presented circumstantial evidence showing Neal, Morton, Dunaway and Moorhead obtained information on Battersby's Ohio case, which Morton admitted having "seen" in Respondents' office. Appellant has also submitted Moske' Affidavit, which detailed Neal admitting there "were more guys involved" in this case. The false information provided by Respondent Moorhead in the LLR case, which was never amended to reflect the truth, facilitated the suspension of Battersby's license. While this circumstantial evidence may not be sufficient to establish conspiracy, they were not without merit and were substantiated by evidence.

(3) Appellant submits he has laid down case law confirming the exceptions to the attorney immunity doctrine. Appellant has also argued that Moorhead's insistence in getting

Neal to file a report, when he knew or should have known that the same had no basis, and inspiring Morton's false testimonies show the willingness on Respondents' part to simply succeed, regardless of the manner.

D. RESPONDENTS FAILED TO ALLEGE NOR PROVE APPELLANT HAD IMPROPER MOTIVES IN FILING THE COMPLAINT.

Rule 11 authorizes a court to impose sanctions on a party who files a frivolous pleadings, motion or other paper or make frivolous arguments. Link v. School District of Pickens County, 302 S.C. 1, 393 SE2d 176 (1990) as cited in Burns v. Univ. Health Services, 340 S.C. 509 (S.C. Ct. App. 2000). Sanctions under Rule 11 may be appropriate if the Court finds that the pleading, motion or paper was filed in bad faith, such as to cause unnecessary delay in the proceedings. Johnson v. Dailey, 318 S.C. 318, 45 S.E.2d 613 (1995) as cited in Burns, supra or as cited in Harwell.

Sanctions are a drastic remedy reserved for only the most extraordinary circumstances and should be the last resort. Whether a claim can survive on the merits is wholly distinct from whether that claim is frivolous. To establish a Rule 11 violation, the filing should be patently without merit or no grounds. Boyd v. United States, C/A: 7:20-cv-00178-BHH-JDA (D.S.C. Jan. 27, 2020), citing Brock v. Angelone, 105 F.3d 952, 953-54 (4th Cir. 1997). In determining whether Rule 11 sanctions should be imposed, the Court does not focus on the merits of the case but rather determine whether Appellant abused the judicial processes.

Appellant filed this Complaint in good faith and did not seek to perpetrate fraud nor cause unnecessary delay on this Court. Respondents have not alleged nor proved Appellant's filing of this complaint is a reprehensible act, going beyond mere negligence and evincing intent. Neither did Respondents aver Appellant filed the Complaint with the sole objective of harassing them. Respondents failed to allege Appellant's bad faith motives.

Appellant and Battersby believed the claims against Respondent Moorhead were based on information elicited during the discovery. Appellant believes he has a valid cause of action against Respondents, based on evidence found herein. Respondents' motion for sanctions is based on a limited reading (or misreading) of the case of *Gaar, supra.* Appellant reasonably believes under the facts and evidence he submitted; his claim is a valid exception to the doctrine of immunity of lawyers.

II.

SANCTION WAS IMPOSED CONTRARY TO THE PURPORTED END OF RULE 11 SCRCP.

Appellant submits the Circuit Court erred in focusing on monetary sanctions. In *Kunstler*, the Court the held that "the least severe sanction adequate to serve the purposes of Rule 11 should be imposed. *Kunstler, supra*. It further stated that while the amount of expense borne by the opposing counsel in combatting frivolous claims may well be an appropriate factor for a district court to consider, the primary purpose of Rule 11 is to deter future litigation abuse. *Id.* In this case, the imposition of the monetary sanctions against him does not achieve the purpose of the law, considering the Complaint has been voluntarily withdrawn.

The case of White v. General Motors Corp., 908 F.2d 675 has laid down the factors to consider in imposing the monetary sanction, to wit: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of Rule 11 violation.

In evaluating the reasonableness of the fee request, the court should consider the very frivolousness of the claim is what justifies the sanctions. *Kunstler, supra.* Appellant has shown the Complaint was not frivolous as it was not totally devoid of merit, nor was it filed in bad faith

and/or with improper purpose. “The mere loss of a case does not subject a party… to a suit by the winner for Sanctions; if it did, the Court system could not function. “

Courts have held “reasonable attorney’s fees in the context of Rule 11 does not necessarily mean actual expenses and attorney’s fees.” Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 211 (4th Cir. 1988) as cited in ***Kunstler.***

With regards to the third factor, ability to pay, Appellant has argued he does not have the ability to pay the ordered amount as his practice focuses on the have-nots. (Motion to Reconsider, dated February 18, 2016). He has provided as proof thereof his 2014 tax returns.

As to the fourth factor, Appellant maintains he has not violated Rule 11 of the SCRCP. Appellant submits he has sufficiently addressed the Circuit Court’s “grounds for imposing the sanction in the previous section.

In sum, Appellant reiterates his position that the sanction imposed against his counsel was improper for the following reasons: (a) the motion did not comply with the consultation requirement under Rule 11 SCRCP; (b) the Complaint and all pleadings, had been withdrawn prior to the request for sanction; (3) the Circuit Court erred in imposing the sanctions based on FCPSA “reasonable attorney” standards; (4) the complaint filed was not frivolous and was based on facts and documented evidence; (5) there was no finding Appellant was motivated by bad faith in filing the Complaint; (6) sanction was not appropriately tailored to achieve the purpose of the rule. Sanctions are meant to restore the balance to the matter, not to harass or injure the other party.

CONCLUSION

Based upon the foregoing, Appellant requests this Honorable Court to reverse the lower court's imposition of the monetary sanction against herein Appellant.

s/Donald L. Smith
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Pro Se

Anderson, South Carolina
Date: March 29, 2021

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SC Court of Appeals

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Case No. 2015-CP-04-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,
In Re: Greg Battersby, — Appellant, Plaintiff

v.

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A., All State Insurance Company, And Allstate Northbrook Indemnity Company, — Defendants,

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A., — Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I certify that I have served a copy of the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal, and Proof of Service of same, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, and the Respondents, by and through their respective counsel of record, via electronic mail in the addresses as follows:

Ms. Jenny Abbott-Kitchings — ctappfilings@sccourts.org

Attorney for Respondents
Mr. Steven M. Krause, Esquire — steve@krauselaw.org
Mr. Timothy Alan Nowacki, Esquire — tim@theclardylawfirm.com

The above-mentioned documents have been served on March 2, 2021.

s/Donald L. Smith
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Anderson, South Carolina
March 29, 2021.

RECEIVED
Mar 29 2021
SC Court of Appeals

FORM 8
LETTER TO THE APPEALS COURT CLERK
FILING INITIAL BRIEF OF APPELLANT AND
DESIGNATION OF MATTER TO BE INCLUDED ON RECORD ON APPEAL

March 29, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: Ex Parte: Donald L. Smith (In Re: Battersby v. Kirkman)
Appellate Case No. 2020-000070

Dear Ms. Kitchings:

Please find attach the following documents for filing:

(1) Initial Brief of Appellant;
(2) Designation of Matter to be Included on Record on Appeal; and,
(3) Proof of Service.

Sincerely,

s/Donald L. Smith
Donald L. Smith, (Bar#6699)
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cc: Mr. Steven M. Krause, Esquire
Mr. Timothy Alan Nowacki, Esquire